

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SHARAN DEFRANCE,
Plaintiff,
v.
JOANNE B. BARNHART,
COMMISSIONER OF SOCIAL
SECURITY,
Defendant.

No. CV-05-282-HU

FINDINGS & RECOMMENDATION

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1 - FINDINGS & RECOMMENDATION

1 HUBEL, Magistrate Judge:

2 Plaintiff Sharan DeFrance brings this action for judicial
3 review of the Commissioner's final decision to deny disability
4 insurance benefits (DIB) and supplemental security income (SSI).
5 This Court has jurisdiction under 42 U.S.C. §§ 405(g) and
6 1383(c)(3). I recommend that the Commissioner's final decision be
7 reversed and remanded for additional proceedings.

8 PROCEDURAL BACKGROUND

9 Plaintiff applied for DIB and SSI on June 20, 2002, alleging
10 an onset date of June 1, 2001. Tr. 64-766, 408-11. Her
11 applications were denied initially and on reconsideration. Tr. 22-
12 26, 28-30, 414-21.

13 On August 5, 2004, plaintiff, represented by counsel, appeared
14 for a hearing before an Administrative Law Judge (ALJ). Tr. 425-
15 49. On November 18, 2005, the ALJ found plaintiff not disabled.
16 Tr. 9-17. The Appeals Council denied plaintiff's request for
17 review of the ALJ's decision. Tr. 5-8.

18 FACTUAL BACKGROUND

19 Plaintiff alleges disability based on schizophrenia. Tr. 71.
20 At the time of the August 5, 2004 hearing, plaintiff was thirty-
21 seven years old. Tr. 495. She has a General Equivalence Diploma
22 (GED), and at the time of the hearing, had completed two years of
23 general studies at Chemeketa Community College. Tr. 125, 429-30.
24 Plaintiff's past relevant work includes dormitory assistant,
25 cashier, data entry clerk, and production worker/assembler. Tr.
26 72, 446-47.

27 I. Medical Evidence

28 Plaintiff has a history of psychiatric hospitalizations for

1 psychoses. The record refers to hospitalizations in December 1994
 2 and January 1995, although the actual records themselves are not in
 3 this administrative record. Tr. 225. Plaintiff was hospitalized
 4 again in May 1997, February 2000, and August 2001. Tr. 205-08,
 5 225-26, 227-28, 268-75, 231. These are discussed more fully below.

6 From May 1995 to May 9, 2000, plaintiff was treated by various
 7 providers at the Chemewa Indian Health Center. Tr. 132-70. At
 8 least for part of that time, she appears to have received regular
 9 counseling sessions with a licensed social worker. E.g., Tr. 168,
 10 167, 166, 163, 161, 160 (appointments with social worker from
 11 September 25, 1995, to October 7, 1996). During this time, the
 12 social worker indicated that plaintiff suffered from depression,
 13 and planned for continued individual counseling. Id.

14 Also during this time, an unknown provider appears to have
 15 seen plaintiff periodically to assess her need for medications.
 16 Tr. 156, 155, 152, 151, 149, 148, 146, 140. (chart notes from
 17 various appointments beginning September 1995 to November 1997).
 18 These notes refer to plaintiff as suffering from depression and
 19 schizoaffective disorder. Id. She was being treated with
 20 Trazodone¹ and Risperdal², and later Zoloft³. Id.

21 Although she had been receiving ongoing treatment from
 22 Chemewa, plaintiff was admitted to Salem Psychiatric Hospital on
 23 May 28, 1997, and discharged June 3, 1997. Tr. 225-26. She was
 24

25 ¹ A selective serotonin reuptake inhibitor anti-depressant.

26 ² An anti-psychotic medication for the treatment of
 27 schizophrenia.

28 ³ A selective serotonin reuptake inhibitor anti-depressant.

1 experiencing disorganized thinking, hallucinations, and had been
2 walking in front of traffic. Id. She had apparently failed to
3 take her Risperdal, but once treated with medications as an in-
4 patient, she rapidly stabilized. Tr. 226. Her final diagnosis was
5 schizophrenia and alcohol abuse. Id.

6 Following her discharge, she continued to receive treatment at
7 Chemewa, as indicated above. Her chart notes indicate that she was
8 pregnant in December 1997, and was seen for a possible postpartum
9 bleeding complication in April 1998. Tr. 139, 140.

10 After that, there is a gap in the records from Chemewa until
11 April 2000. On February 11, 2000, plaintiff was again admitted to
12 Salem Psychiatric Hospital where she stayed for almost one month,
13 until March 6, 2000. Tr. 227-28, 269-302. She was brought to a
14 psychiatric crisis center by her father who was concerned about her
15 ability to take care of her child. Tr. 227. She was then
16 transferred to the hospital. Id.

17 Dr. Scott Babe, M.D., who treated her as an inpatient, noted
18 that she was an extremely difficult patient who denied any symptoms
19 of depression or psychosis. Id. He also noted her "severe history
20 of substance abuse." Id. She was subjected to numerous tests,
21 including an MRI, CT scan, MMPI, and other neuropsychiatric
22 testing. Id. As described by Dr. Babe, the MMPI showed long-term
23 personality problems and possible avoidance and schizoid lifestyle.
24 Id.

25 During her stay, plaintiff was extremely withdrawn. Id.; Tr.
26 268-302. She was placed on Zyprexa⁴ at an increasing dose and
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28 ⁴ An anti-psychotic medication used to treat schizophrenia.

1 then, approximately four to five days before discharge, given
2 BuSpar⁵ because it was thought she could be suffering a "severe
3 depression which would be causing a pseudodementia-like picture."
4 Tr. 227.

5 Dr. Babe noted plaintiff's past inability to continue with her
6 medications and that she had been "flagrantly psychotic at times."
7 Tr. 228. He also noted that she had had periods of "distinct
8 success" as well. Id. Her admitting and discharge diagnoses were
9 both "confusion," but secondary diagnoses were amphetamine abuse,
10 cocaine abuse, and schizophrenia. Tr. 268. She was discharged on
11 Wellbutrin⁶ and Zyprexa. Tr. 228.

12 Following her discharge from the hospital, plaintiff was
13 assessed by Marion County Mental Health Psychiatric Mental Health
14 Nurse Practitioner Ben Newman, on March 13, 2000. Tr. 185-87.
15 Newman noted that plaintiff's recent hospitalization was
16 precipitated by her arrest for neglecting the care of her son. Tr.
17 186. He noted that her affect was relatively flat and her behavior
18 was calm. Id. She had some "tangentiality" with vague and
19 illogical responses to questions. Id. Newman noted that her
20 previous history indicated auditory hallucinations. Id. She was
21 somewhat disoriented. Id. He assessed her with the following
22 diagnoses: psychotic disorder, nos; r/o amphetamine induced
23 psychotic disorder; r/o polysubstance dependence (cocaine,
24 amphetamines, drugs of choice); r/o post traumatic stress disorder
25 with delayed onset (related to sexual abuse at age twelve by
26

27 ⁵ An anti-anxiety medication.

28 ⁶ An anti-depressant medication.

1 twenty-one year old male). Tr. 187. Newman remarked that although
2 she denied using illegal drugs, she had a positive test for cocaine
3 and amphetamines while in the psychiatric hospital. Id.

4 Newman assigned plaintiff with a Global Assessment of
5 Functioning (GAF) of 30. Id. He continued treatment with Zyprexa
6 and Wellbutrin. Id.

7 Plaintiff was next seen at Marion County Mental Health on
8 April 10, 2000, by Sohyon Goldsmith, Psychiatric Mental Health
9 Nurse Practitioner. Tr. 188-8u9. Goldsmith noted that plaintiff
10 appeared to be a person with schizophrenic, psychotic symptoms.
11 Tr. 188. She recited plaintiff's previous psychiatric symptoms as
12 auditory hallucinations, disorganized thought patterns and speech
13 patterns, anxiety, depressive mood, unable to care for herself, and
14 poor memory. Id.

15 Plaintiff reported to Goldsmith that she had been compliant
16 with her Zyprexa and Wellbutrin medications and that she felt
17 "balanced." Id. She was currently living with her mother. Id.
18 Her judgment and insight were quite poor, as was her long term
19 memory. Id. Goldsmith's diagnoses were psychotic disorder, nos;
20 r/o schizophrenia, undifferentiated type; r/o amphetamine induced
21 psychotic disorder; r/o poly-substance dependence; and r/o post-
22 traumatic stress disorder secondary to sexual abuse at age twelve.
23 Tr. 189. She assessed her with a GAF of 30, kept her on Zyprexa
24 and Wellbutrin, and intended to refer her to an alcohol and drug
25 treatment program. Tr. 189. Although her note indicates that
26 plaintiff was to return to see Goldsmith three weeks later, there
27 is no record of any subsequent visit. There is a note that she was
28 assessed by the alcohol and drug program on April 21, 200 and was

1 determined eligible to receive outpatient treatment. Tr. 194.
2 There are no records of such treatment in this administrative
3 record.

4 Plaintiff returned to Chemewa Indian Health Services for two
5 visits in April 2000. On April 25, 2000, she was seen for a lump
6 in her neck and the chart note refers to her being on Zyprexa. Tr.
7 135. On April 26, 2000, a medical doctor whose signature is
8 illegible, notes that she was taking Zyprexa and Wellbutrin. Tr.
9 133. That physician also noted that she was diagnosed with
10 schizoaffective disorder, a "chronic mental health condition [with]
11 no cure, [with a] lifetime medication need[.]" Id. The physician
12 also opined that plaintiff's "employment status [was] poor." Id.

13 On May 1, 2000, plaintiff was evaluated by Paul S. Stoltzfus,
14 Psy. D., on behalf of Disability Determination Services (DDS). Tr.
15 125-31. At the time, plaintiff was living with her mother who
16 reported her history of symptoms, including paranoia and
17 hallucinations. Tr. 128. Dr. Stoltzfus diagnosed plaintiff as
18 suffering from schizophrenia, paranoid type, in recent remission,
19 with a GAF of 50. Tr. 130. He opined that she appeared to be
20 doing remarkably well with her current medical regime. Id. He
21 remarked that while using her medications, she apparently was no
22 longer paranoid, she was more comfortable with people, more
23 dependable, and was able to provide more consistent care for her
24 son. Tr. 130-31.

25 Dr. Stoltzfus also noted that she was probably able to find
26 some sort of employment. Tr. 130. He stated that plaintiff was
27 eager to find work as a filing clerk or some other simple office
28 job. Id. Cognitively, she functioned in the average range with an

1 eighth-grade reading level. Id. He concluded that "[w]ith
2 guidance and medical compliance, she is probably able to pursue a
3 variety of employment, particularly within her area of interest in
4 janitorial and menial office work." Tr. 131.

5 On June 16, 2000, DDS psychologist Dorothy Anderson, Ph.D.,
6 completed a mental residual functional capacity assessment and
7 psychiatric review technique form regarding plaintiff. Tr. 171-83.
8 Dr. Anderson noted that plaintiff had a history of acute psychotic
9 episodes that improved with treatment. Tr. 173. She noted the
10 presence of psychotic features and deterioration that are
11 persistent (either continuous or intermittent), as evidenced by the
12 presence of delusions or hallucinations, the presence of catatonic
13 or other grossly disorganized behavior, and the presence of an
14 inappropriate affect. Tr. 177. In rating the severity of
15 plaintiff's impairment, Dr. Anderson found plaintiff to have slight
16 restrictions of daily living and moderate difficulties in
17 maintaining social functioning. Tr. 182. She further found that
18 plaintiff would often have deficiencies of concentration,
19 persistence, or pace resulting in the failure to complete tasks in
20 a timely manner in work settings or elsewhere, and that plaintiff
21 once or twice had episodes of deterioration or decompensation in
22 work or a work-like setting which cause the individual to withdraw
23 from that situation or to experience an exacerbation of signs and
24 symptoms. Id.

25 Dr. Anderson further assessed plaintiff as moderately limited
26 in the ability to understand and remember detailed instructions,
27 the ability to carry out detailed instructions, the ability to
28 maintain attention and concentration for extended periods, and the

1 ability to interact appropriately with the general public. Tr.
2 171-72. She determined that plaintiff was able to understand,
3 remember, and follow through on simple tasks and routines without
4 special supervision and had no clear problems with pace. Tr. 173.
5 Although she was generally socially appropriate, Dr. Anderson
6 concluded that plaintiff should have limited public contact. Id.

7 The administrative record contains no relevant records for the
8 time period between Dr. Anderson's assessment and plaintiff's next
9 admission to Salem Psychiatric Hospital on August 14, 2001. Tr.
10 205-09, 231-66. Plaintiff remained an inpatient until September 6,
11 2001. Tr. 231. Her admitting diagnosis was confusion. Id.

12 In an August 15, 2001 history and physical written by Dr.
13 Babe, Dr. Babe noted that while plaintiff had historically
14 responded well to medication, she was chronically medication
15 noncompliant. Tr. 207. He also noted her prior substance abuse.
16 Tr. 207-08.

17 Dr. Babe examined plaintiff on August 15, 2001, and noted that
18 although plaintiff had been living at home, she had become
19 increasingly worse over time and had refused to take medications,
20 and over the past several days before admission, had refused to
21 take care of herself, including not eating, not showering, not
22 seeing to her activities of daily living, and refusing all
23 medications. Tr. 207. By report, she had been mute for three days
24 before admission. Id.

25 Upon admission, plaintiff refused all laboratory tests and
26 refused to allow assessment of her condition. Id. She refused
27 food and fluids and remained mute in her room. Id. Dr. Babe spoke
28 to her in her room with nursing staff present and plaintiff "sat

1 there appearing quite paranoid, shifting her eyes back and forth,
2 and appearing quite fearful." Id. Dr. Babe's assessment at the
3 time was of psychosis, nos; r/o schizoaffective disorder; r/o
4 methamphetamine dependence; r/o cocaine dependence; r/o alcohol
5 dependence; r/o withdrawal state. Tr. 208. He further assessed
6 her GAF at 20. Id.

7 Her diagnoses on discharge were of schizoaffective disorder
8 with a GAF of 70. Tr. 205. Dr. Babe noted that during her
9 hospital stay, plaintiff continued to refuse food and fluids, but
10 because of a syncopal or pre-syncopal episode, she was treated with
11 IV fluids and provided with Haldol⁷. Id. She continued to be
12 difficult and would often "cheek" her medications. Id. She was
13 switched to Zyprexa which appeared to be more effective. Id. She
14 progressed extremely slowly and was then restarted on Haldol, along
15 with Zyprexa. Id.

16 She continued to progress slowly, but by the time of
17 discharge, was taking medications and appeared to be more
18 compliant. Tr. 206. She was interacting in groups although she
19 still remained quite mute most of the time. Id. Her relevant
20 medications at discharge were Haldol, Wellbutrin, and Zyprexa. Id.
21 She was discharged to Ryles Center, a facility in Portland. Id.

22 On September 7, 2001, plaintiff was evaluated by Dr. Neil
23 Falk, M.D., at Ryles Center. Tr. 342-45. After noting her history
24 and recent hospitalization, Dr. Falk observed that at present,
25 plaintiff continued to appear mildly to moderately paranoid and
26 have significant negative symptoms of a chronic psychotic illness,

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28 ⁷ An anti-psychotic medication used to treat schizophrenia.

1 including poverty of content, flat affect, flat speech, and social
2 isolation. Tr. 342. Plaintiff appears to have been discharged
3 from Ryles Center on September 20, 2001. Tr. 344-45.

4 Plaintiff began care on September 27, 2001, with Dr. Joseph B.
5 Arnold, M.D., at Polk County Mental Health. Tr. 303-20. He saw
6 her regularly until at least January 2003. Id. Dr. Arnold
7 initially noted that plaintiff continued to show symptoms while an
8 inpatient at Ryles Center, including medication noncompliance,
9 refusal to eat and drink, and exhibition of paranoia. Tr. 318. He
10 initially diagnosed her with schizophrenia and assessed a GAF of
11 40. Tr. 320. Her medications were Zyprexa, Haldol, and
12 Wellbutrin. Id.

13 On October 30, 2001, Dr. Arnold's diagnosis was paranoid
14 schizophrenia. Tr. 317. He noted that plaintiff reported that she
15 was doing well and felt better on this current combination of
16 medications. Id.

17 In January 2002, Dr. Arnold changed his diagnoses to drug
18 induced psychosis and catatonic schizophrenia. Tr. 314-15. The
19 change was prompted by his finally being able to review the history
20 from the Ryles Center and the Salem Psychiatric Hospital. Id.
21 Plaintiff reported no psychotic symptoms and doing well. Id. Dr.
22 Arnold noted that she was tracking the conversation, was organized,
23 and was taking good care of her son. Id. He reduced the dosage of
24 Haldol because of plaintiff's complaints of amenorrhea. Id.

25 Plaintiff missed several appointments between January 2002 and
26 May 30, 2002. Tr. 307. At that time, she told Dr. Arnold that she
27 had missed these appointments because she was attending school.
28 Id.

1 On July 16, 2002, Polk County Mental Health staff completed an
2 annual update of plaintiff and noted there was no psychosis
3 currently present. Tr. 348. Her diagnoses were schizophrenia,
4 catatonic and paranoid types, and polysubstance abuse in remission.
5 Id. Her treatment plan included medication management with Dr.
6 Arnold, case management for support and resource assistance, and a
7 personal care assistant to monitor medication dispensing and
8 household maintenance. Id. Her GAF was assessed at 40. Id.

9 Plaintiff continued to see Dr. Arnold regularly and maintain
10 compliance with her medication regimen. E.g., Tr. 306. During one
11 visit on July 23, 2002, Dr. Arnold noted that while plaintiff
12 tracked the conversation, she was "slightly off cue." Id. He
13 reduced the dosage of Wellbutrin because of plaintiff's request to
14 reduce her medications. Id.

15 In an August 27, 2002 letter to DDS, Dr. Arnold, responding to
16 a request from DDS, provided copies of all his mental health
17 assessments, psychiatric evaluations, and progress notes. Tr. 305.
18 He also stated the following: "You also requested my opinion
19 concerning this patient's ability to do work-related activity. My
20 contacts with this individual have been within an office, and
21 therefore, I am unable to offer any opinions other than what is
22 contained the [sic] above referenced data." Id. Although the
23 letter bears Dr. Arnold's signature, the signature was put there by
24 someone with the initials "hd." Id.

25 Plaintiff saw Dr. Arnold again on November 7, 2002. Tr. 350.
26 He noted that while she was not psychotic, she reported hearing the
27 doorbell ring at night. Id. However, Dr. Arnold did not believe
28 this represented a hallucination. Id. Plaintiff reported being

1 required to do a job search and not tolerating that stress. Id.
2 Dr. Arnold remarked that she was not doing a good job of policing
3 her child's behavior during the visit. Id. He then stated that "I
4 do not think Sharan is capable of seeking or maintaining gainful
5 employment. I wrote her a note to that effect." Id. No such note
6 appears in the administrative record.

7 That same date, Dr. Arnold sent another letter to DDS, again
8 in response to a request from DDS, and again provided copies of
9 plaintiff's medical records. Tr. 304. He also included, verbatim,
10 the same paragraph regarding his opinion of plaintiff's work-
11 related abilities, as in his August 27, 2002 letter: "You also
12 requested my opinion concerning this patient's ability to do work-
13 related activity. My contacts with this individual have been
14 within an office, and therefore, I am unable to offer any opinions
15 other than what is contained the [sic] above referenced data." Id.
16 This letter, like the previous one to DDS, contained Dr. Arnold's
17 signature by "hd." Id.

18 On November 20, 2002, plaintiff was evaluated by Maribeth
19 Kallemeyn, Ph.D. Tr. 321-27. Plaintiff reported to Dr. Kallemeyn
20 that her current medications, Zyprexa and Wellbutrin, helped her
21 "keep a balance," meaning made it easier for her to concentrate on
22 what she was doing. Tr. 322. Plaintiff denied that she had
23 current, or past, psychotic symptoms. Id. Her current mood was
24 good. Id.

25 Plaintiff further reported to Dr. Kallemeyn that she was
26 functioning well in her daily life, was consistently caring for her
27 son, was able to do household chores including cooking and cleaning
28 regularly, was regularly exercising, and was benefitting from

1 weekly counseling sessions regarding parenting. Tr. 326. In
2 response to a question about her goals for work, plaintiff reported
3 that "I don't want to have a breakdown again and go back to the
4 psychiatric hospital." Tr. 325-26. She also reported that her
5 "doctor said I should wait." Id. Her current GAF was assessed at
6 65. Id.

7 On December 2, 2002, DDS psychologist Peter LeBray, Ph.D.,
8 performed a residual functional assessment of plaintiff and
9 completed a psychiatric review technique form. Tr. 328-41. He
10 noted plaintiff's schizoaffective disorder and polysubstance abuse
11 in remission. Tr. 330, 336. He found that she had one or two
12 episodes of decompensation in work or a work-like setting which
13 cause the individual to withdraw from that situation or to
14 experience an exacerbation of signs and symptoms. Tr. 333. He
15 also referred to an attached narrative which does not appear to be
16 in the administrative record. Tr. 340.

17 Finally, plaintiff saw Dr. Arnold twice in January 2003. Tr.
18 351-52. Her diagnoses on January 9, 2003, were psychosis, nos;
19 drug abuse mixed, alleged remission; and alcohol abuse, alleged
20 remission. Tr. 351. In response to plaintiff's complaints of
21 weight gain, Dr. Arnold started to taper her off Zyprexa and
22 started her on Abilify⁸. Id. On January 30, 2003, plaintiff
23 reported good results with the new medication, no recurrence of
24 psychotic symptoms, minimal side effects, and weight loss. Tr.
25 352. She seemed to do a good job of managing her son who came with
26 her to the visit, and tracked the conversation. Id. Dr. Arnold

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28 ⁸ An anti-psychotic medication used to treat schizophrenia.

1 planned to continue her on Wellbutrin and Abilify. Id.

2 II. Medical Expert Testimony

3 During the hearing before the ALJ, Larry Hart, Ph.D.,
4 testified as a medical expert. Tr. 440-46. Dr. Hart testified
5 that plaintiff suffered from impairments under Listings 12.03
6 (Schizophrenic, Paranoid, and Other Psychotic Disorders), 12.04
7 (Affective Disorders), and 12.09 (Substance Addiction Disorders).
8 Tr. 440. In regard to the 12.03 listing, Dr. Hart opined that
9 plaintiff suffered from a drug-induced psychosis, possibly
10 aggravating a schizoaffective condition, which appeared to have
11 remitted. Tr. 441. He indicated that the psychotic component
12 "appears to have remitted kind of nicely in '02, lastly in '03 by
13 the file because it's controlled by medications." Id. He also
14 remarked that plaintiff had "aggressively ceased at some point in
15 time . . . illicit drugs." Id.

16 As to the 12.04 listing, Dr. Hart opined that plaintiff was
17 suffering from a major depressive disorder. Tr. 442. However, he
18 further opined that it was in significant remission. Tr. 443. In
19 regard to the 12.09 listing, he opined that plaintiff had been in
20 remission since August 2001. Tr. 444-45.

21 Dr. Hart then testified regarding plaintiff's current
22 functioning as of the time of the hearing. Tr. 445-46. He
23 assessed her as having "none to slight" impairments in activities
24 of daily living and in social functioning. Tr. 445. In the area
25 of concentration, persistence, or pace, he stated that "mostly it
26 looks like seldom, occasional often." Tr. 445. The ALJ then asked
27 Dr. Hart to repeat his answer regarding difficulties in
28 concentration, persistence, and pace, and Dr. Hart responded "[f]or

1 the most part seldom[,] . . . [m]aybe occasionally it might hit the
2 often level[.]" Tr. 446.

3 III. Plaintiff's Testimony

4 Plaintiff testified that she receives General Assistance and
5 is on the Oregon Health Plan. Tr. 428. She has gone to community
6 college for the past two years, taking general studies classes
7 full-time. Tr. 429. She receives good grades and hopes to pursue
8 a bachelor of arts degree in music, followed by a master's degree
9 in music. Id.

10 She said she had been sober from alcohol for eight years, and
11 although she initially said she could not answer when she last used
12 methamphetamine, she later suggested, during Dr. Hart's testimony,
13 that she had not used it since the fall of 2001. Tr. 444.

14 The ALJ inquired about her history of medication
15 noncompliance, noting that she goes "off the deep end" and ends up
16 in the hospital when she stops taking her medication. Tr. 432.
17 Plaintiff agreed with the ALJ's assessment and noted that if her
18 medication is unavailable or she lacks supervision, she does not
19 take it. Id. At the time of the hearing, she was seeing Dr.
20 Arnold every three months, and talked to her counselor Carol
21 Hufendag every Friday "to make sure that I'm doing okay with my
22 medicine." Id.

23 Plaintiff agreed that she was doing much better at the time of
24 the hearing in August 2004 than she had been in the fall of 2001.
25 Id. She gave a lot of credit to Dr. Arnold and her counselors who
26 have been there for her and have taken time to call her and help
27 her. Tr. 432-33.

28 The ALJ asked plaintiff if she thought she could handle having

1 a job. Tr. 434. Plaintiff responded that she could not. Id. She
2 explained: "I keep telling myself yes, I can work, I can work and
3 I keep trying to go back and for some reason it just doesn't work
4 out. I can't handle the pressure, I guess." Id. She stated that
5 the last time she worked was in 2001. Tr. 434-35.

6 Plaintiff tried to explain that going to school was different
7 from working because with school, she was doing something positive
8 and learning something she wanted to learn. Tr. 435. At work, she
9 is afraid of not doing her job well and of getting fired, or not
10 performing to her supervisor's expectations. Tr. 436. In the work
11 setting, she lacks self-confidence. Id. She gets fearful, her
12 mind starts running rapidly, and she starts thinking bad things
13 will happen. Id. Then, instead of "facing up and seeing the
14 outcome, [she] just run[s] away from it[.]" Id.

15 IV. Vocational Expert Testimony

16 Vocational Expert (VE) Hanoeh Livneh, Ph.D., testified at the
17 hearing. Tr. 446-48. Livneh described plaintiff's past relevant
18 work as dormitory assistant, retail cashier, data entry clerk, and
19 production worker/assembler. Tr. 446-47.

20 The ALJ posed the following hypothetical to the VE: a thirty-
21 seven year old female with about fourteen years of education, with
22 the past relevant work as just described by the VE, who has no
23 exertional limitations, but is limited to occasional contact with
24 others for interaction and would need work of "a steady pace,
25 there's no fluctuation in the demands." Tr. 447. In response, the
26 VE explained that if the fluctuations were only occasional in
27 nature, then the person could perform the past relevant work of
28 data entry clerk and production worker. Id.

1 Upon further inquiry from plaintiff's counsel, the VE
2 testified that if the fluctuations were more than occasional
3 nature, "which means if they really start becoming a little bit
4 more frequent," then the person could not perform those positions.
5 Tr. 447-48.

6 THE ALJ'S DECISION

7 The ALJ found that plaintiff had not engaged in substantial
8 gainful activity since her alleged onset date of June 1, 2001. Tr.
9 13, 17. The ALJ then determined that plaintiff suffered from the
10 medically severe impairments of schizophrenia, depression, and drug
11 and alcohol abuse in alleged remission. Tr. 14, 17. Id. However,
12 he found that none of plaintiff's impairments, or combination of
13 impairments, met or equaled a listed impairment. Tr. 14, 15, 17.

14 Next, the ALJ determined plaintiff's residual functional
15 capacity (RFC). Tr. 15-16. The ALJ noted that relevant criteria
16 for evaluation of an individual's RFC are: (1) the individual's
17 activities; (2) the location, duration, frequency, and intensity of
18 the individual's pain or other symptoms; (3) factors that
19 precipitate and aggravate the symptoms; (4) the type, dosage,
20 effectiveness, and side effects of any medication the individual
21 takes or has taken to alleviate pain or other symptoms; (5)
22 treatment, other than medication, the individual receives or has
23 received for relief of pain or other symptoms; (6) any measures
24 other than treatment the individual uses to relieve pain or other
25 symptoms; and (7) any other factors concerning the individual's
26 functional limitations and restrictions due to pain or other
27 symptoms. Tr. 15-16.

28 The ALJ found plaintiff's testimony partially credible, to the

1 extent that she does have impairments which cause limitations, but
2 not to the extent that she is precluded from all work activities.
3 Tr. 16. He found that the totality of the medical records, in
4 conjunction with Dr. Hart's testimony, revealed that her
5 impairments are only mild when she is compliant with her
6 medications and when she does not abuse drugs or alcohol. Id. He
7 noted that Dr. Stoltzfus, who examined plaintiff in May 2000,
8 stated that she could probably work. Id. The ALJ further noted
9 that plaintiff was enrolled in school and doing well and "numerous
10 treatment records and examinations have noted she is able to
11 function and is able to work when she is compliant with her
12 medications and free from the influence of drugs and alcohol." Tr.
13 16.

14 The ALJ then found that plaintiff had the RFC to engage in
15 steady paced work with only occasional contact with others for
16 interaction. Id. She has no exertional limitations. Id. He
17 stated that this RFC "is not inconsistent with the medical record
18 of evidence or with the testimony of the claimant and is therefore
19 adopted as the best evidence of the claimant's overall ability to
20 perform basic work activities." Id. Based on the VE's testimony,
21 the ALJ concluded that with this RFC, plaintiff was able to return
22 to her past relevant work as a data entry clerk and production
23 worker and thus, she was not disabled under the Social Security
24 Act. Tr. 16-17.

25 STANDARD OF REVIEW & SEQUENTIAL EVALUATION

26 A claimant is disabled if unable to "engage in any substantial
27 gainful activity by reason of any medically determinable physical
28 or mental impairment which . . . has lasted or can be expected to

1 last for a continuous period of not less than 12 months[.]" 42
2 U.S.C. § 423(d)(1)(A). Disability claims are evaluated according
3 to a five-step procedure. Baxter v. Sullivan, 923 F.2d 1391, 1395
4 (9th Cir. 1991). The claimant bears the burden of proving
5 disability. Swenson v. Sullivan, 876 F.2d 683, 687 (9th Cir.
6 1989). First, the Commissioner determines whether a claimant is
7 engaged in "substantial gainful activity." If so, the claimant is
8 not disabled. Bowen v. Yuckert, 482 U.S. 137, 140 (1987); 20
9 C.F.R. §§ 404.1520(b), 416.920(b). In step two, the Commissioner
10 determines whether the claimant has a "medically severe impairment
11 or combination of impairments." Yuckert, 482 U.S. at 140-41; see
12 20 C.F.R. §§ 404.1520(c), 416.920(c). If not, the claimant is not
13 disabled.

14 In step three, the Commissioner determines whether the
15 impairment meets or equals "one of a number of listed impairments
16 that the [Commissioner] acknowledges are so severe as to preclude
17 substantial gainful activity." Yuckert, 482 U.S. at 141; see 20
18 C.F.R. §§ 404.1520(d), 416.920(d). If so, the claimant is
19 conclusively presumed disabled; if not, the Commissioner proceeds
20 to step four. Yuckert, 482 U.S. at 141.

21 In step four the Commissioner determines whether the claimant
22 can still perform "past relevant work." 20 C.F.R. §§ 404.1520(e),
23 416.920(e). If the claimant can, he is not disabled. If he cannot
24 perform past relevant work, the burden shifts to the Commissioner.
25 In step five, the Commissioner must establish that the claimant can
26 perform other work. Yuckert, 482 U.S. at 141-42; see 20 C.F.R. §§
27 404.1520(e) & (f), 416.920(e) & (f). If the Commissioner meets its
28 burden and proves that the claimant is able to perform other work

1 which exists in the national economy, he is not disabled. 20
2 C.F.R. §§ 404.1566, 416.966.

3 The court may set aside the Commissioner's denial of benefits
4 only when the Commissioner's findings are based on legal error or
5 are not supported by substantial evidence in the record as a whole.
6 Baxter, 923 F.2d at 1394. Substantial evidence means "more than a
7 mere scintilla," but "less than a preponderance." Id. It means
8 such relevant evidence as a reasonable mind might accept as
9 adequate to support a conclusion. Id.

10 DISCUSSION

11 Plaintiff argues that the ALJ made three errors: (1)
12 improperly rejected her testimony about her inability to work; (2)
13 improperly rejected her treating physician Dr. Arnold's opinion
14 that she could not work; and (3) failed to incorporate all parts of
15 medical expert Dr. Hart's testimony regarding her limitations in
16 concentration, persistence, and pace.

17 I. Treating Physician's Opinion

18 If a treating physician's opinion is uncontradicted by another
19 physician, it may be rejected only for clear and convincing
20 reasons. Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995). If
21 the treating physician's opinion is contradicted, it may be
22 rejected for "specific and legitimate reasons" supported by
23 substantial evidence in the record. Id.

24 As noted above, on November 7, 2002, Dr. Arnold saw plaintiff
25 and noted plaintiff's report that she was not tolerating the stress
26 of a required job search. Tr. 350. His chart note then states
27 that "I do not think Sharan is capable of seeking or maintaining
28 gainful employment. I wrote her a note to that effect." Id.

1 The ALJ rejected Dr. Arnold's opinion because (1) Dr. Arnold's
2 opinion did not disclose whether plaintiff was using drugs or
3 alcohol; (2) the opinion did not state whether it was based on her
4 mental impairments, her drug or alcohol abuse, or her medical
5 noncompliance; (3) the evidence showed that when she was clean and
6 sober and medically compliant, she was able to work; and (4) Dr.
7 Arnold had previously refused to offer an opinion regarding her
8 ability or inability to work. Tr. 14.

9 Plaintiff contends that these articulated reasons are not
10 legitimate and are not supported by substantial evidence in the
11 record. First, plaintiff argues that the ALJ cannot undermine Dr.
12 Arnold's opinion based on Dr. Arnold having listed plaintiff's
13 diagnoses, on that date, as including "drug induced psychosis
14 (provisional diagnosis)," "[d]rug abuse, cocaine, amphetamines,
15 status unknown," and "[a]lcohol abuse, status unknown," when the
16 ALJ himself concluded that plaintiff stopped using drugs in August
17 2001 and alcohol before that. I agree with plaintiff.

18 The record as a whole, including the records from Polk County
19 Mental Health where Dr. Arnold practiced, supports the ALJ's
20 conclusion that plaintiff abstained from drugs and alcohol
21 beginning at least since August 2001. Dr. Arnold's chart notes
22 show that when he first examined plaintiff in late September 2001,
23 he diagnosed her with schizophrenia. Tr. 317-20. After receiving
24 the records from Ryles Center and Salem Psychiatric Center
25 regarding her August-September 2001 treatment, he changed his
26 diagnosis to drug-induced psychosis. Tr. 314.

27 However, in July 2002, he changed this diagnosis to a
28 provisional one, suggesting that it was no longer conclusively

1 accurate. A reasonable inference to be drawn from this change is
2 that the basis of plaintiff's psychosis being drug-induced became
3 provisional because plaintiff was no longer using drugs. This
4 inference is further supported by the fact that just two months
5 after opining that plaintiff could not work, Dr. Arnold's diagnoses
6 changed again. Tr. 351. On January 9, 2003, his diagnoses were
7 psychosis NOS, and alcohol and drug abuse in alleged remission.
8 Id. Moreover, on July 16, 2002, Polk County Mental Health staff
9 conducted a one-year mental health update of plaintiff's status and
10 diagnosed her polysubstance abuse as being in remission. Tr. 348.
11 Thus, the Polk County Mental Health records show that plaintiff's
12 diagnosis of psychosis, which remained throughout her treatment
13 there, was at some point no longer attributable to her illegal drug
14 and alcohol abuse.

15 Other evidence in the record confirms that at the time Dr.
16 Arnold expressed his November 7, 2002 opinion regarding plaintiff's
17 inability to work, her drug and alcohol abuse was in remission.
18 E.g., Tr. 336 (December 2, 2002 report of DDS psychologist Dr.
19 Peter LeBray notes polysubstance abuse in remission).

20 Given the evidence in the record as a whole, given that Dr.
21 Arnold's chart notes lack any basis for concluding that he
22 suspected she was continuing to use drugs while under his care, and
23 given that the ALJ himself found sufficient evidence in the record
24 to conclude that plaintiff had not used drugs or alcohol beginning
25 at least in August 2001, rejecting Dr. Arnold's opinion because it
26 failed to disclose whether plaintiff was using drugs or alcohol at
27 the time was not proper.

28 The same reasoning applies to the ALJ's suggestion that Dr.

1 Arnold's opinion is not credible because it does not indicate if it
2 is based on her medication noncompliance. While the record clearly
3 demonstrates that plaintiff decompensates into psychosis when she
4 does not take her medications, there is no suggestion whatsoever
5 from Dr. Arnold's chart notes that plaintiff had failed or refused
6 to take her medications since September 2001 while treating with
7 him. Even when plaintiff missed appointments with Dr. Arnold
8 (which she explained to Dr. Arnold as due to school attendance),
9 she still called in to get her medications refilled. E.g., Tr.
10 308, 311. Because plaintiff was compliant with her medications
11 during her treatment with Dr. Arnold, and when he reached his
12 diagnosis, there was no need for Dr. Arnold to discuss it in the
13 context of his opinion on plaintiff's inability to work. Where the
14 record supports the diagnosis, there is no requirement that the
15 treating physician discuss the myriad diagnoses not found, nor the
16 potential causes not found. Thus, the ALJ's rejection of Dr.
17 Arnold's opinion because it did not specify if it was based on
18 plaintiff's medication noncompliance, was improper.

19 Second, plaintiff argues that to the extent the ALJ rejected
20 Dr. Arnold's opinion because the basis of the opinion was unclear,
21 the ALJ was obligated to further develop the record by recontacting
22 Dr. Arnold. As explained in a 1996 case, if the ALJ thinks he or
23 she needs to know the basis of the physician's opinions in order to
24 evaluate them, he has "a duty to conduct an appropriate inquiry,
25 for example, by subpoenaing the physicians or submitting further
26 questions to them[,]" or "continu[ing] the hearing to augment the
27 record." Smolen v. Chater, 80 F.3d 1273, 1288 (9th Cir. 1996).

28 Defendant contends that further development of the record as

1 suggested in Smolen is required only when a report is ambiguous or
2 the evidence as a whole is insufficient to make a disability
3 determination. Defendant argues that here, there was more than
4 adequate evidence upon which to evaluate plaintiff's limitations.
5 Defendant also suggests that the fact that a physician's opinions
6 were in conflict with other evidence or lacked clarity does not
7 trigger a duty to recontact the physician but instead, provides a
8 reason to discount the physician's opinion.

9 The ALJ stated that Dr. Arnold "fails to quantify his opinion
10 as to whether the claimant's inability [to work] lies due to her
11 mental impairments, her polysubstance abuse, her non-compliance
12 with medication or a combination thereof." Tr. 14. For the
13 reasons discussed immediately above, there is no basis in the
14 record to support a conclusion that Dr. Arnold's opinion could have
15 been based on plaintiff's polysubstance abuse or her non-compliance
16 with medication. Thus, of the possible bases offered by the ALJ,
17 the only remaining basis for Dr. Arnold's opinion is that
18 plaintiff's inability to work is due to her mental impairments.

19 Third, plaintiff argues that while the medical records show
20 that once she became clean and sober and compliant with her
21 medications, her functioning significantly improved, this is not a
22 legitimate basis for rejecting Dr. Arnold's November 2002 opinion
23 that she could not work. Plaintiff testified to the significant
24 stress she experiences in a work setting, and reported to Dr.
25 Arnold the stress she experienced with looking for work, and
26 testified how a work setting is distinguishable from her ability to
27 cope with school.

28 She further contends that the ALJ's reliance on her

1 significant improvement in life functioning and her ability to
2 handle the pressures of a community college curriculum as a basis
3 for rejecting her treating physician's opinion that she cannot
4 work, conflicts with Social Security Regulation (SSR) 85-15
5 (available at 1985 WL 56857). The regulation notes that
6 individuals with mental disorders often have highly individualized
7 responses to work stress and though they may be able to adopt a
8 certain lifestyle within which they appear to function well, and
9 may function adequately in the community with good mental health
10 services, they still may not be able to meet "the requirements of
11 even so-called 'low-stress' jobs." 1985 WL 56857, at *6.

12 Defendant argues that an opinion that is inconsistent with the
13 rest of the evidence is properly rejected. Defendant notes that
14 Dr. Arnold's notes support the ALJ's conclusion that once plaintiff
15 became medically compliant and stopped using drugs and alcohol, her
16 function improved. Defendant further notes that with the exception
17 of the November 7, 2002 chart note where Dr. Arnold opined that she
18 was unable to work because she could not tolerate the stress of a
19 work search, the remainder of his notes indicate that she had no
20 abnormalities on mental status examination, was doing well, was
21 having no problems, had no psychotic symptoms, and was able to take
22 good care of her son.

23 While defendant accurately depicts Dr. Arnold's chart notes,
24 I agree with plaintiff that the fact that the medical evidence
25 generally supports the ALJ's finding that her functioning improved
26 significantly after she stopped using drugs and abusing alcohol and
27
28

1 became compliant with her medications⁹, is not a legitimate basis
2 to reject Dr. Arnold's opinion about the effect on her of work-
3 related stress. During the several years of medical records
4 contained in the administrative record, there does not appear to
5 have been a time when plaintiff sustained medication compliance and
6 sobriety while working. Thus, there is no evidence in the record
7 affirmatively showing plaintiff's ability to sustain her medication
8 regimen and sobriety while working. Given the references in the
9 record to the episodic nature of her disease, e.g., Tr. 326 (Dr.
10 Kallemeyn's diagnosis of episodic schizophrenia), and the fact that
11 Dr. Arnold had full knowledge of her improved functioning and
12 school endeavors, but nonetheless still opined that she could not
13 work, there is no support for the ALJ's rejection of Dr. Arnold's
14 opinion based on her improved functioning outside of the workplace.

15 Finally, in support of his rejection of Dr. Arnold's opinion,
16 the ALJ noted that in August 2002, Dr. Arnold had refused to state
17 an opinion on the issue of plaintiff's work abilities. Tr. 14.
18 Defendant argues that a contradiction between a doctor's opinion
19 and that doctor's notes and observations is a clear and convincing
20 reason for not relying on the doctor's opinion.

21 There are several problems with the ALJ's rejection of Dr.
22 Arnold's opinion based on the August 27, 2002 letter from Dr.
23 Arnold to DDS. First, the letter, after indicating that it was

24
25 ⁹ While defendant's references to comments appearing in Dr.
26 Arnold's chart notes are accurate, defendant omits a reference by
27 Dr. Arnold to plaintiff being "off cue," and on one visit, doing
28 a poor job of policing her child's behavior. Thus, the chart
notes generally support the ALJ's determination that her
functioning improved significantly, but they nonetheless reflect
occasions of less than desirable functioning. Tr. 306, 350.

1 enclosing all mental health assessments, initial psychiatric
2 evaluations, and progress notes, then went on to state:

3 You also requested my opinion concerning this patient's
4 ability to do work-related activity. My contacts with
5 this individual have been within an office setting, and
6 therefore, I am unable to offer any opinions other than
7 what is contained the [sic] above referenced data.

8 Tr. 305. The letter does not refuse to offer an opinion. Rather,
9 it refuses to offer an opinion separate from what may be reflected
10 in the mental health assessments, initial psychiatric evaluations,
11 and progress notes. As of August 27, 2002, none of those
12 assessments, evaluations, or notes makes an express reference or
13 opinion to plaintiff's ability or inability to work. Thus, the
14 August 27, 2002 letter, when written, did not contradict Dr.
15 Arnold's November 7, 2002 opinion that plaintiff cannot work.

16 Second, on the date Dr. Arnold offered his opinion that
17 plaintiff cannot work, November 7, 2002, he issued a virtually
18 identical letter to DDS. Tr. 304. There, he indicates he is
19 sending, again, all mental health assessments, initial psychiatric
20 evaluations, and progress notes. Id. He then stated the same
21 paragraph, word for word including the presumably inadvertent
22 omission of the word "in" between "contained" and "the." Again,
23 this is not a refusal to state an opinion but rather, is a refusal
24 to state an opinion other than what is in the assessments,
25 evaluations, and notes. Notably, included in those notes is the
26 November 7, 2002 progress note in which Dr. Arnold states that "I
27 do not think Sharan is capable of seeking or maintaining gainful
28 employment." Tr. 350. Accordingly, one interpretation of this
evidence is that there is no contradiction between the letter and
the progress note.

1 However, this could also be interpreted as a contradiction,
2 but it is at best ambiguous and cannot, on this record,
3 legitimately be used to negate Dr. Arnold's opinion. This
4 ambiguity should have been resolved by the ALJ with Dr. Arnold.

5 Because none of the reasons offered by the ALJ for rejecting
6 Dr. Arnold's opinion are legitimate bases supported in the record,
7 the ALJ erred in rejecting Dr. Arnold's opinion.

8 II. Plaintiff's Testimony

9 Once a claimant shows an underlying impairment and a causal
10 relationship between the impairment and some level of symptoms,
11 clear and convincing reasons are needed to reject a claimant's
12 testimony if there is no evidence of malingering. Smolen, 80 F.3d
13 at 1281-82. When determining the credibility of a plaintiff's
14 limitations, the ALJ may properly consider several factors,
15 including the plaintiff's daily activities, inconsistencies in
16 testimony, effectiveness or adverse side effects of any pain
17 medication, and relevant character evidence. Orteza v. Shalala, 50
18 F.3d 748, 750 (9th Cir. 1995). The ALJ may also consider the
19 ability to perform household chores, the lack of any side effects
20 from prescribed medications, and the unexplained absence of
21 treatment for excessive pain when determining whether a claimant's
22 complaints of pain are exaggerated. Id.

23 The ALJ rejected plaintiff's testimony about her inability to
24 work. He gave the following explanation:

25 Careful consideration has been given to the
26 claimant's testimony and it has been found to be somewhat
27 credible to the extent she does have impairments which do
cause limitations, but not to the extent she is preclude
[sic] from all work activities.

28 The totality of the medical records in conjunction

1 with the testimony of the medical expert reveals
2 plaintiff's impairments are only mild when she is
3 compliant with her medications and not abusing drugs and
4 alcohol. Dr. Stoltzfus, who examined claimant in May
5 2000[,] noted that she "could probably work." Exhibit
6 1F. There is no objective reason why she could not be
7 employed as of August 2001. She has been and is
8 currently enrolled in school and is doing well [fn 1] and
9 numerous treatment records and examinations have noted
10 she is able to function and is able to work when she is
11 compliant with her medications and free from the
12 influence of drugs and alcohol.

13 fn 1. She testified that for the last two years,
14 she has carried as [sic] course load and earns good
15 grades, except a speech class where she found
16 public speaking too difficult for her.

17 Tr. 16.

18 Plaintiff argues that the ALJ erred in rejecting her testimony
19 because the ALJ's reasoning is impermissibly vague and Dr.
20 Stoltzfus's opinion is ambiguous in the context of his assessment
21 that plaintiff had a GAF of 50. Moreover, plaintiff argues, her
22 testimony is supported by her treating physician and the
23 recognition expressed by SSR 85-15, noted above, that individuals
24 with mental disorders may function adequately in certain contexts,
25 but still be unable to cope with work stress.

26 Defendant concedes that the ALJ did not list, in the specific
27 paragraph containing his findings, the medical reports upon which
28 he relied in evaluating plaintiff's credibility. But, defendant
29 argues, the ALJ's summary of those records in a preceding part of
30 his decision, is sufficient.

31 While I agree with defendant that the ALJ need not recite
32 "magic words" in his decision, I cannot agree that a summary of the
33 medical evidence in the context of an entirely separate part of the
34 sequential analysis provides the required clear and convincing
35 reasons need to reject a plaintiff's subjective testimony. The ALJ

36 30 - FINDINGS & RECOMMENDATION

1 summarized plaintiff's medical records in his assessment of step
2 two of the analysis, requiring a determination of whether the
3 claimant has a medically severe impairment or combination of
4 impairments. The summary does not articulate why plaintiff's
5 testimony on the issue of her ability to work is undermined by the
6 vast majority of the medical testimony regarding her improved
7 stability while compliant with her medications and while sober and
8 abstaining from drug use.

9 Given plaintiff's particular disease, the ALJ needed to
10 clearly and convincingly articulate why plaintiff's significant
11 improvement in overall life functioning is transferable to a
12 workplace setting, thus making her testimony to the contrary not
13 credible. The ALJ failed to do this, instead citing to the
14 "totality of the medical records" which simply support the bulk of
15 plaintiff's testimony that she is indeed experiencing significant
16 improvement.

17 Next, plaintiff contends that the one specific piece of
18 evidence cited by the ALJ in support of his rejection of her
19 testimony is internally inconsistent and thus, is not a clear and
20 convincing reason for such rejection. I agree with plaintiff.

21 The ALJ stated that in May 2000, Dr. Stoltzfus examined
22 plaintiff and remarked that she "could probably work." Tr. 16.
23 However, as plaintiff notes, at the same time that Dr. Stoltzfus
24 offered this opinion, he assessed plaintiff with a GAF of 50. Tr.
25 130. A GAF of 50 is defined as "[s]erious symptoms (e.g., suicide
26 ideation, severe obsessional rituals, frequent shoplifting) OR any
27 serious impairment in social, occupational, or school functioning
28 (e.g., no friends, unable to keep a job)." Am. Psychiatric Ass'n,

1 Diagnostic & Statistical Manual of Mental Disorders 34 (4th ed.
2 Text Revision 2000) (DSM-IV-TR).

3 Dr. Stoltzfus's comments about plaintiff's ability to work
4 are inconsistent with his own GAF assessment and thus, are
5 ambiguous. As such, his opinion about her work ability is not a
6 clear and convincing reason upon which to reject plaintiff's
7 subjective testimony. Moreover, neither the ALJ, nor defendant
8 attempts to reconcile Dr. Stoltzfus's May 1, 2000 comments about
9 plaintiff's work ability with the statement made by plaintiff's
10 treating physician at Chemewa Indian Health Services only four days
11 earlier that her employment status was poor. Tr. 133. Finally,
12 the ALJ failed to analyze whether Dr. Stoltzfus's opinion about
13 plaintiff's probable ability to work is undermined by the fact that
14 subsequent to that opinion, plaintiff was hospitalized again in
15 2001.

16 Because the ALJ failed to articulate clear and convincing
17 reasons for rejecting plaintiff's subjective testimony, he erred.

18 III. Medical Expert

19 Plaintiff contends that Dr. Hart's testimony actually shows
20 that plaintiff would experience limitations in concentration,
21 persistence, and pace up to one-third of the workday, and that the
22 ALJ failed to include this limitation in his hypothetical to the
23 VE.

24 As noted above, Dr. Hart opined that occasionally, plaintiff
25 would often have increased limitations in maintaining
26 concentration, persistence, or pace. Tr. 446 ("[f]or the most part
27 seldom[,] . . . [m]aybe occasionally it might hit the often
28 level[.]" Tr. 446. Plaintiff contends that the Social Security

1 Administration defines "occasionally" as one-third of the workday
2 and that Dr. Hart's testimony amounted to an opinion that for up to
3 one-third of the workday, plaintiff would often have lapses in
4 concentration, persistence, and pace. Plaintiff argues that
5 failure to include this in the hypothetical to the VE was error.
6 Plaintiff further contends that remand to the VE is unnecessary
7 because Dr. Hart's opinion conclusively establishes that plaintiff
8 is disabled.

9 Dr. Hart's testimony is ambiguous. In one sentence, he uses
10 "for the most part," "seldom," "occasionally," and "often" along
11 with "maybe" and "might." While one can speculate about the
12 intended opinion regarding plaintiff's limitations in
13 concentration, persistence, and pace, a guess is not good enough.
14 SSR 83-10 defines "occasionally" as "occurring from very little up
15 to one-third of the time." SSR 83-10 (found at 1983 WL 31251, at
16 *5). It is unclear if Dr. Hart used "occasionally" to mean "very
17 little" or "up to one-third of the time." An additional concern
18 with plaintiff's argument is that this definition, at least as
19 contained in SSR 83-10, is used to define the requirement of a
20 sedentary exertional level. Id. There is no indication that the
21 same definition applies to the use of the term in regard to an
22 individual's limitations in concentration, persistence, or pace.
23 This ambiguity should have been clarified with Dr. Hart by the ALJ.
24 IV. Remand for Additional Proceedings or Benefits

25 The court has discretion to reverse the Commissioner's final
26 decision with or without a remand for further administrative
27 proceedings. Harman v. Apfel, 211 F.3d 1172, 1177 (9th Cir. 2000).
28 When an ALJ improperly rejects evidence, the court should credit

1 such evidence and remand for an award of benefits when: "'(1) the
2 ALJ failed to provide legally sufficient reasons for rejecting such
3 evidence, (2) there are no outstanding issues that must be resolved
4 before a determination of disability can be made, and (3) it is
5 clear from the record that the ALJ would be required to find the
6 claimant disabled were such evidence credited.'" Moore v.
7 Commissioner, 278 F.3d 920, 926 (9th Cir. 2002) (quoting Smolen, 80
8 F.3d at 1292).

9 This Court is aware of Ninth Circuit cases recognizing that
10 the "crediting as true" rule is not mandatory. Connett v.
11 Barnhart, 340 F.3d 871, 876 (9th Cir. 2003). Thus, when a court
12 finds that the ALJ improperly rejected the subjective symptom
13 testimony of a claimant, it has some flexibility and is not
14 required to credit the testimony as a matter of law and direct an
15 award of benefits. Id. However, this Court has previously
16 suggested that the rule remains mandatory where the ALJ has
17 improperly rejected the opinion of a treating physician.
18 Kirkpatrick v. Barnhart, No. CV-03-657-HU, Op. & Ord. Adopting F&R
19 at p. 2-3 (D. Or. Sept. 16, 2004); see also Benecke v. Barnhart,
20 379 F.3d 587, 594-95 (9th Cir. 2004) (in a post-Connett case, Ninth
21 Circuit credited the opinions of treating physicians and claimant's
22 testimony when ALJ failed to provide legally sufficient reasons for
23 rejecting this evidence, and reversed a district court order of
24 remand for further administrative proceedings and instructed that
25 the district court remand for payment of benefits). Of course, the
26 doctor's opinion must not be ambiguous or the Court will not know
27 which interpretation to credit as true.

28 Here, I conclude that remand for additional proceedings is

1 appropriate because the Smolen test is not met. Although the ALJ
2 failed to provide legally sufficient reasons for rejecting Dr.
3 Arnold's opinion that plaintiff was incapable of seeking or
4 maintaining gainful employment, Dr. Arnold's opinion, when viewed
5 in the context of the November 2, 2002 boilerplate letter, is
6 unclear and thus, does not by itself provide a basis upon which to
7 award benefits. That is, while the November 2, 2002 boilerplate
8 letter could not legitimately be used to reject Dr. Arnold's
9 opinion of that same date that plaintiff could not seek or maintain
10 employment, the fact that his opinion was issued on the same date
11 as that letter makes the opinion ambiguous. The ALJ should have
12 obtained clarification from Dr. Arnold in the first instance and
13 having failed to do so then, the case should be remanded to the ALJ
14 to do so now.

15 Additionally, Dr. Hart's testimony is also ambiguous, creating
16 another outstanding issue that should be resolved before a
17 determination of disability can be made. Given that remand for
18 additional evidence is appropriate for clarification of Dr.
19 Arnold's opinion and Dr. Hart's testimony, it is appropriate to
20 remand for additional proceedings even though the ALJ also
21 improperly rejected plaintiff's testimony. With the uncertainty in
22 the medical evidence, the ALJ should, after clarifying the medical
23 evidence, be given the opportunity to reevaluate plaintiff's
24 testimony at that time.

25 CONCLUSION

26 The Commissioner's decision should be reversed and the case
27 remanded for additional proceedings.

28 / / /

35 - FINDINGS & RECOMMENDATION

1 SCHEDULING ORDER

2 The above Findings and Recommendation will be referred to a
3 United States District Judge for review. Objections, if any, are
4 due May 30, 2006. If no objections are filed, review of the
5 Findings and Recommendation will go under advisement on that date.

6 If objections are filed, a response to the objections is due
7 June 13, 2006, and the review of the Findings and Recommendation
8 will go under advisement on that date.

9 IT IS SO ORDERED.

10 Dated this 12th day of May, 2006.

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13 /s/ Dennis James Hubel
14 Dennis James Hubel
United States Magistrate Judge
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